A

Avisena Healthcare Sdn Bhd (previously known as Avisena Women & Children Sdn Bhd) v Child A (an infant, suing through his parents and next friend, Monica Gill dan Mohd Saffuan bin Johari) & Ors

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)(NCvC)-1346–07 OF 2022
RAVINTHRAN, AZMAN ABDULLAH AND AZMI ARIFFIN JJCA
14 DECEMBER 2023

C

Civil Procedure — Setting aside — Application for — Appellant applied to set aside respondents' writ of summons and statement of claim — Allegations of medical negligence during delivery of first respondent — Respondents pleaded appellant was vicariously liable for negligent act or omissions of attending physician — Whether reasonable cause of action existed against appellant

D

This was an appeal by the appellant ('first defendant') against the High Court's decision in dismissing the the first defendant's application to strike out the respondents' ('plaintiffs') writ of summons and statement of claim. The first plaintiff was the son of the second and third plaintiffs. The first defendant was a hospital where the second defendant, an obstetrician and gynaecologist, carried out her medical practice at the first defendant's hospital. The second plaintiff received her treatments at the premises of the first defendant's hospital under the care, management and treatment of the second defendant. The first and second plaintiffs alleged that they had sustained injuries following the delivery and the first plaintiff had to be admitted to the Neonatal Intensive Care Unit at the first defendant's hospital. The plaintiffs had then issued a letter of demand to the defendants to demand for compensation as a result of the said injuries and losses arising from their failure and/or neglect to comply with the standard duty of care owed towards the first and second plaintiffs. The first defendant had then issued a letter to the plaintiffs to deny the allegations made and to request for further documentations to investigate the claims made. The letter also contained information that the second defendant was an independent contractor at the first defendant's hospital. The plaintiffs filed a suit at the High Court against the defendants for allegation of medical negligence during the delivery of the first plaintiff and pleaded that the first defendant was vicariously liable for the negligent act or omissions of the second defendant being the second defendant's employer. The first defendant applied to strike out the plaintiffs' writ of summons and statement of claim. In dismissing the first defendant's application, the learned High Court judge was of the view that this matter ought not to be summarily disposed as there were

E

F

G

H

I

triable issues, and parties ought to be given opportunity to be heard during full trial where witnesses could be called to testify. Hence, this appeal.

Held, allowing the appeal:

(1) The second defendant was a self-employed person who practiced at the first defendant's hospital. The first defendant had no control over the advice by the second defendant as a consultant and gynaecologist at any time during the period of care, treatment and management of the first plaintiff and second plaintiff while at the first defendant's hospital. Further, at no time did the second defendant raised an objection to the first defendant's application to strike out the plaintiffs' claims against the first defendant. The second defendant had also never challenged the nature of the relationship between the defendants to be one of an employer-employee relationship. The sudden filing of the statement of claim (without providing the details) was merely an afterthought. The plaintiffs had ulterior motive in filing the suit against the first defendant. It was solely done to protect their own interest and not done in a bona fide manner. As a result, the plaintiffs were not entitled to seek the aid of the court as they had not come before the court with a clean hand. Finally, the non-delegable duty of care relied on by the plaintiffs against the first defendant sprung a surprise because the plaintiffs did not plead this material facts in their statement of claim with particulars. It was only alluded to in the reply to the defence. This was truly unacceptable and merely an afterthought (see paras 29–31, 35 & 37).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('defendan pertama') terhadap keputusan Mahkamah Tinggi yang menolak permohonan defendan pertama untuk membatalkan writ saman dan pernyataan tuntutan responden ('plaintif'). Plaintif pertama ialah anak kepada plaintif kedua dan ketiga. Defendan pertama adalah hospital di mana defendan kedua, pakar perbidanan dan sakit puan, menjalankan amalan perubatannya di hospital defendan pertama. Plaintif kedua menerima rawatannya di premis hospital defendan pertama di bawah jagaan, pengurusan dan rawatan defendan kedua. Plaintif pertama dan kedua mendakwa bahawa mereka telah mengalami kecederaan selepas bersalin dan plaintif pertama terpaksa dimasukkan ke unit rawatan rapi neonatal di hospital defendan pertama. Plaintif kemudiannya telah mengeluarkan surat tuntutan kepada defendan untuk menuntut pampasan akibat kecederaan dan kerugian tersebut yang timbul daripada kegagalan dan/atau pengabaian mereka untuk mematuhi kewajipan berjaga-jaga standard yang terhutang terhadap plaintif pertama dan kedua. Defendan pertama kemudiannya telah mengeluarkan surat kepada plaintif untuk menafikan dakwaan yang dibuat dan meminta dokumentasi lanjut untuk menyiasat tuntutan yang dibuat. Surat itu juga mengandungi maklumat bahawa defendan kedua adalah

kontraktor bebas di hospital defendan pertama. Plaintif memfailkan saman di Mahkamah Tinggi terhadap defendan atas dakwaan kecuaian perubatan semasa kelahiran plaintif pertama dan memplid bahawa defendan pertama bertanggungjawab secara vikarius bagi perbuatan cuai atau peninggalan defendan kedua sebagai majikan defendan kedua. Defendan pertama memohon untuk membatalkan writ saman dan pernyataan tuntutan plaintif. Dalam menolak permohonan defendan pertama, hakim Mahkamah Tinggi yang bijaksana berpandangan bahawa perkara ini tidak sepatutnya diselesaikan secara ringkas kerana terdapat isu yang boleh dibicarakan, dan pihak perlu diberi peluang untuk didengar semasa perbicaraan penuh di mana saksi boleh dipanggil untuk memberi keterangan. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Defendan kedua ialah seorang yang bekerja sendiri yang menjalankan amalan di hospital defendan pertama. Defendan pertama tidak mempunyai kawalan ke atas nasihat defendan kedua sebagai perunding dan pakar sakit puan pada bila-bila masa sepanjang tempoh penjagaan, rawatan dan pengurusan plaintif pertama dan plaintif kedua semasa berada di hospital defendan pertama. Selanjutnya, defendan kedua tidak pernah membangkitkan bantahan terhadap permohonan defendan pertama untuk membatalkan tuntutan plaintif terhadap defendan pertama. Defendan kedua juga tidak pernah mencabar sifat hubungan antara defendan sebagai salah satu hubungan majikan-pekerja. Pemfailan secara tiba-tiba penyata tuntutan (tanpa memberikan butiran) hanyalah satu pemikiran terkemudian. Plaintif mempunyai motif tersembunyi dalam memfailkan saman terhadap defendan pertama. Ia dilakukan semata-mata untuk melindungi kepentingan mereka sendiri dan bukan dilakukan secara bona fide. Akibatnya, plaintif tidak berhak untuk mendapatkan bantuan mahkamah kerana mereka tidak hadir ke mahkamah dengan suci hati. Akhir sekali, kewajipan berhati-hati yang tidak boleh diwakilkan yang disandarkan oleh plaintif terhadap defendan pertama menimbulkan kejutan kerana plaintif tidak memplid fakta material ini dalam pernyataan tuntutan mereka dengan butiran. Ia hanya disebut dalam jawapan kepada pembelaan. Ini benar-benar tidak boleh diterima dan hanya satu pemikiran terkemudian (lihat perenggan 29–31, 35 & 37).]

Cases referred to

Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2000] 2 MLJ 417; [2000] 1 MLRA 111, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Blue Valley Plantation Bhd v Periasamy a/l Kuppannan & Ors [2011] 5 MLJ 521, FC (refd)

Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281; [2018] 3 CLJ 427, FC (folld)
Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685; [2017] 10 CLJ 529, FC (folld)
Lim Gim Seah v Lokman bin Talib & Ors [2012] 4 MLJ 308,CA (refd)
See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235; [2013] 4 MLRA 259, CA (refd)
Tan Kim Hor & Ors v Tan Heng Chew & Ors [2003] 1 MLJ 492, CA (refd)

Legislation referred to

Private Healthcare Facilities and Services Act 1998
Rules of Court 2012 O 18 r 19, 19(1)(a), (1)(b), (1)(c), (1)(d), O 92 r 4

Appeal from: Civil Appeal No BA-23NCvC-63–12 of 2021 (High Court, Shah Alam)

Razlan Hadri bin Zulkifli (with Aina Nadhirah bt Ahmad Shobri) (Gan Ho & Razlan Hadri) for the appellant.
Esther Hor Su Ying (with Gan Jer Nynn) (Esther Hor, Mohanthas, Scully) for the respondents.

Azmi Ariffin JCA:

INTRODUCTION

[1] By encl 15, the appellant/first defendant vide a notice of application dated 25 March 2022 pursuant to O 18 r 19(1)(a), (b), (c) and (d) and O 92 r 4 of the Rules of Court 2012 seeking to strike out the respondents/plaintiffs' writ summons and statement of claim filed on 14 December 2021.

[2] For ease of reference, the appellant shall be hereinafter referred to as the first defendant, Dr Norleen bt Mohd Salleh, in the respondents' suit, will be referred to as the second defendant. Whilst the respondents child A ('first plaintiff'), Monica Gill ('second plaintiff') and Mohd Saffuan bin Johari ('third plaintiff') will be collectively referred to as the plaintiffs in this judgment.

BACKGROUND FACTS

[3] The first plaintiff is the son of the second and third plaintiffs.

[4] The first defendant is a hospital where the second defendant, an obstetrician and gynaecologist, carries out her medical practice at the first defendant's hospital.

[5] The second defendant received her pre-natal treatments at the premises of the first defendant's hospital since 10 December 2019 under the care, management and treatment of the second defendant. A

[6] Throughout the treatments, the second plaintiff was told that her amniotic fluid was low. In light of this, the procedure of induced labour was proposed to the second plaintiff by the second defendant and was agreed upon by the second plaintiff. B

[7] The second plaintiff went into labour on 28 February 2020. C

[8] The first and second plaintiff alleged that they had sustained injuries following the said delivery and the first plaintiff had to be admitted to the Neonatal Intensive Care Unit at the first defendant's hospital. D

[9] The plaintiffs through their solicitors had then issued a letter of demand dated 29 January 2021 to the first and second defendant to demand for compensation as a result of the said injuries and losses arising from their failure and/or neglect to comply with the standard duty of care owed towards the first and second plaintiffs. E

[10] Following thereto, the first defendant's solicitors had then issued a letter dated 5 February 2021 to the plaintiffs' solicitors to deny the allegations made and to request for further documentations to investigate the claims made. The letter also contained information that the attending physician, ie the second defendant, is an independent contractor at the first defendant's hospital. F

[11] On 14 December 2021, the plaintiffs filed a suit at the Shah Alam High Court against the first and second defendants for allegation of medical negligence during the delivery of the first plaintiff on 29 February 2020. G

[12] The plaintiffs pleaded that the first defendant is vicariously liable for the negligent act or omissions of the second defendant being the second defendant's employer. H

[13] The filing of parties' pleadings was closed 7 March 2022.

[14] On 25 March 2022, the first defendant filed an application (encl 15) to strike out the plaintiffs' writ of summons and statement of claim. I

[15] On 17 June 2022, the learned High Court judge dismissed the first defendant's application with costs of RM3,000.

[16] Dissatisfied with the said interlocutory decision, on 13 July 2022, the first appellant filed an appeal to the Court of Appeal vide encl 43.

THE RELEVANT PROVISION OF LAW

[17] The laws applicable are as follows:

(a) O 18 r 19 of the Rules of Court 2012:

> Striking out pleadings and endorsement (O 18 r 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(b) O 92 r 4 of the Rules of Court 2012 states:

> 4 Inherent powers of the Court
>
> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

HIGH COURT DECISION

[18] In reaching its decision, the learned High Court judge in his grounds of judgment which we reproduce herein below held, among others as follows:

> [10] Di dalam affidavit sokongan yang difailkan defendan pertama menegaskan plaintif-plaintif membuat tuntutan terhadap defendan pertama berdasarkan tanggungan vikarius (*vicarious liability*) defendan pertama ke atas kecuaian defendan kedua. Defendan pertama menegaskan hubungan di antara defendan pertama dan defendan kedua telah diasaskan kepada 'resident consultant agreement' (perjanjian tersebut). Berdasarkan perjanjian tersebut defendan kedua adalah kontraktor bebas dan bukan pekerja defendan pertama.
>
> [11] Peguam defendan pertama berhujah defendan pertama pertama adalah kontraktor bebas yang menjalankan amalan perubatan di premis defendan pertama berasaskan perjanjian yang dimasuki di antara defendan pertama dan defendan kedua. Oleh itu hubungan yang wujud bukanlah hubungan pekerja dan majikan

dan tanggungan defendan kedua tidak boleh dialihkan (*vicariously liable*) kepada defendan pertama. A

[12] Peguam plaintif-plaintif pula berhujah kedudukan di dalam kes ini jelas menunjukkan plaintif mendapatkan rawatan di hospital defendan pertama dengan bergantung kepada reputasi hospital defendan pertama. Ini mewujudkan hubungan di antara plaintif dan defendan pertama dari sejak plaintif kedua mendapatkan rawatan di premis defendan pertama sehinggalah defendan pertama dilahirkan. Plaintif kedua tidak mempunyai apa-apa kawalan ke atas defendan kedua dan bergantung kepada defendan pertama untuk mengawal defendan kedua di dalam amalan perubatannya di hospital defendan pertama. B

[13] Peguam plaintif berhujah keadaan di dalam kes ini tidaklah dengan jelas menunjukkan tuntutan plaintif-plaintif terhadap defendan pertama dengan jelasnya tidak boleh dipertahankan. C

[14] Saya telah meneliti permohonan defendan pertama dan telah menimbangkan hujah-hujah yang dikemukakan. Saya berpuas hati tuntutan plaintif-plaintif terhadap defendan pertama tidaklah dengan jelas dan nyata tidak boleh dipertahankan dan dengan yang demikian patut dibatalkan secara ringkas. D

[15] Mahkamah jelasnya hanya boleh membatalkan pliding terutamanya berdasarkan alasan di dalam A 18 k 19(1)(a) di dalam keadaan yang benar-benar jelas (see *Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2013] 4 MLRA 259). Defendan pertama bergantung sepenuhnya kepada alasan bahawa tidak wujud hubungan yang menimbulkan tanggungan vikarius di antara defendan pertama dan defendan kedua bagi membatalkan tuntutan plaintif-plaintif. Oleh itu isu sama ada terdapat hubungan yang menimbulkan tanggungan vikarius tersebut mesti diputuskan berdasarkan fakta-fakta yang lengkap. E F

[16] Fakta-fakta yang ada di dalam permohonan ini adalah berdasarkan penegasan yang terdapat di dalam affidavit-affidavit yang difailkan. Persoalannya adakah fakta-fakta tersebut benar-benar lengkap untuk mahkamah membuat keputusan membatalkan tuntutan plaintif-plaintif terhadap defendan pertama secara ringkas? G

[17] Kes-kes duluan yang dirujuk oleh kedua-dua pihak di dalam penghujahan mereka semuanya diputuskan selepas perbicaraan penuh yang menunjukkan kedua-dua pihak telah mempunyai peluang untuk mengemukakan keterangan bagi membuktikan fakta-fakta untuk memutuskan isu tanggungan vikarius tersebut.

[18] Selepas meneliti penegasan-penegasan di dalam affidavit yang difailkan saya berpuas hati fakta yang dibentangkan di dalam affidavit-affidavit tersebut tidaklah mencukupi untuk mahkamah ini membuat keputusan tentang tanggungan vikarius tersebut. Oleh itu kedua-dua pihak terutamanya plaintif patut diberi peluang untuk mengemukakan keterangan-keterangan yang boleh membuktikan tanggungan vikarius tersebut. Pada tahap ini mahkamah tidak perlu membuat penilaian atau keputusan bahawa keterangan-keterangan tersebut jika dikemukakan telah membuktikan tanggungan vikarius defendan pertama. Apa yang perlu adalah peluang yang cukup diberikan kepada plaintif. H I

[19] Oleh itu tidaklah boleh dikatakan bahawa dengan berdasarkan pliding yang difailkan adalah jelas dan nyata plaintif-plaintif tidak mempunyai kausa tindakan

A yang munasabah terhadap defendan pertama.

[20] Selanjutnya saya juga pertimbangkan alasan-alasan lain yang disandar oleh defendan pertama untuk membatalkan tuntutan plaintif pertama iaitu tuntutan plaintif-plaintif mengaibkan, remeh dan menyusahkan serta merupakan penyalahguanaan proses mahkamah.

B

[21] Saya berpuas hati defendan-defendan telah gagal membuktikan alasan-alasan yang disandar tersebut. Defendan pertama perlu membuktikan alasan-alasan yang disandar tersebut. Penegasan defendan pertama bahawa tuntutan plaintif-plaintif terhadap defendan pertama sebagai mengaibkan, remeh dan menyusahkan serta merupakan penyalahguanaan proses mahkamah adalah berasaskan alasan bahawa

C defendan pertama tidak boleh dikenakan tanggungan secara vikarius jika defendan kedua secara cuai bertanggungan ke atas plaintif-plaintif. Dapatan mengenai perkara tersebut telah saya capai seperti di atas. Berdasarkan dapatan di atas dan keadaan di dalam kes ini tuntutan plaintif-plaintif terhadap defendan pertama bukanlah sesuatu yang remeh, mengaibkan dan menyusahkan.

D

[22] Berdasarkan dapatan-dapatan yang saya capai, saya berpuashati defendan pertama tidak dapat membuktikan alasan-alasan permohonan mereka untuk membatalkan tuntutan plaintif pertama secara ringkas di bawah A 18 k 19(1), Kaedah-Kaedah Mahkamah 2012.

E [23] Berdasarkan alasan-alasan dan dapatan di atas mahkamah ini tidak boleh membatalkan tuntutan plaintif secara ringkas seperti yang dipohon oleh defendan pertama di dalam lampiran 15.

[19] In essence, the learned High Court judge was of the view that this F matter ought not to be summarily disposed as there are triable issues, and parties ought to be given opportunity to be heard during full trial where witnesses can be called to testify. As such, it cannot be resolved merely looking at the affidavit evidence in deciding whether the first defendant is vicariously liable towards the alleged negligent act committed by the second defendant and G whether the first defendant owes a duty of care towards the first and second plaintiffs.

LAW ON STRIKING OUT

H **[20]** In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, the Supreme Court through the judgment delivered by Mohamed Dzaiddin bin Hj Abdullah SCJ (as he then was) held as follows:

I The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of*

Lancaster v L & NW Ry Co [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in para materia with our O 33 r 2 Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[21] Similarly, in *Blue Valley Plantation Bhd v Periasamy a/l Kuppannan & Ors* [2011] 5 MLJ 521, the Federal Court had occasion to deal with an application to strike out a petition to wind up a company. In *Blue Valley Plantation*, the Federal Court had opined that the court should only allow application to strike out a winding-up petition where the petition itself was obviously unsustainable for want of cause of action or it being vexatious, frivolous or an abuse of process. The Federal Court cited with approval the dicta by the Court of Appeal in *Tan Kim Hor & Ors v Tan Heng Chew & Ors* [2003] 1 MLJ 492:

> We find the philosophy implicit in the above statements convincing and adopt it in affirming the view that an application made pursuant to O 18 r 19 of the RHC to strike out a petition presented under s 218 of the Act is undesirable and should be discouraged. In our view, the use of that procedure in such winding up proceeding produces only delay in the adjudication of the matter. Of course, we are not saying that it is totally inapplicable. There may be an instance where such a petition is obviously unsustainable for want of cause of action or that it is plainly vexatious or frivolous or even an abuse of process. In such a case, O 18 r 19 could be resorted to.

[22] In *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2013] 4 MLRA 259, speaking through Ramly Ali JCA (as he then was) the court opined as follows:

> [11] The learned judge must bear in mind that striking out a claim for no reasonable cause of action under sub-para (1)(a) is only appropriate in a plain and obvious case. The learned judge must be satisfied that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiffs to the relief which they asked for. The procedure is a summary procedure. It should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable.
>
> Just look at the statement of claim. The test to be applied is whether on the face of the statement of claim, the court is prepared to conclude that the cause of action is obviously unsustainable (see *Federal Court decision in New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226; [1984] 1 MLRA 771).

[23] The Court of Appeal in *Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417; [2000] 1 MLRA 111 through

Mokhtar Sidin JCA (as he then was) delivering the judgment of the court held as follows:

> [14] In considering whether Carah's statement of claim is scandalous, frivolous or vexatious under O 18 r 19(1)(b), or is an abuse of the process of the court under O 18 r 19(1)(c) or under the inherent jurisdiction of the court under O 92 r 4, the court is entitled to look at the affidavit evidence and the exhibits. Looking at the above pleadings, and the lengthy affidavits and the various exhibits filed by Carah and the lenders, there is a serious conflict of material affidavit evidence which can only be resolved by subjecting the deponents to cross-examinations and/or calling other witnesses whose evidence can only be evaluated by the court after seeing and hearing them. The court cannot conduct a trial on the silent cold-printed or typewritten words in the opposing affidavits where there is a serious dispute or conflict on material facts, a finding of which by the trial judge will have a decisive consequence on the case of the parties. We are mindful of what Lord Diplock said in the House of Lords in *American Cyanamid v Ethicon Ltd* [1975) AC 396 at p 407:
>
> > ... The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to be decided difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

The first defendant submissions:

(a) no partnership relationship between the first and second defendant;

(b) the second defendant is an independent contractor who practices at the first defendant's hospital;

(c) resident consultant agreement remains a lawfully binding agreement between the first and second defendant;

(d) the second defendant did not challenge the terms of the said agreement and the nature of her relationship with the first defendant;

(e) there was a gap of ten months before the writ summons and statement of claim was filed;

(f) the first and second defendant relationship is one not of an employer employee;

(g) the first defendant is vicariously liable for the acts and omissions of the second defendant as the alleged employer;

(h) no material facts of negligence were pleaded against the first defendant except allegation of vicarious liability of the first defendant; and

(i) the plaintiffs cannot rely on the 'new issues' of non-delegable duty that

has not been pleaded in their statement of claim. Neither there was any attempt by the plaintiff to amend their statement of claim.

The plaintiff's submissions:

(a) there are triable issues of vicarious liability that can be established on the first defendant and the matter ought to be determined by way of a full trial;

(b) there exists reasonable cause of action against the first appellant which is not 'obviously unsustainable';

(c) the first defendant has control over the second defendant therefore establishing an employer-employee relationship;

(d) the first defendant is vicariously liable towards the act of negligence committed by the second defendant; and

(e) the first defendant owes a non-delegable duty towards the second plaintiff. The issue was raised purely to provide clarity and full understanding of the dispute in the plaintiffs' suit.

OUR DECISIONS

[24] It is pertinent to emphasise that in application under O 18 r 19(1) of the Rules of Court 2012, we are not duly concerned with the prospect of success or failure of plaintiff's claim. This is a matter for the trial judge to decide on evidence adduced before him. The only issue here is whether there exists reasonable cause of action against the first defendant. Hence, the correct approach must still be that the court must focus its mind to the critical issue of whether or not the first defendant is vicariously liable for the second defendant's alleged acts of negligence.

[25] Before turning to the findings of this honourable court, we find it necessary to begin by examining two Federal Court decisions directly on point which is the very same subject matter in the present appeal.

[26] Md Raus Sharif CJ delivering the judgment of the Federal Court in *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 10 CLJ 529 highlighted the test for vicarious liability where the court held that:

> [96] We will first deal with the general question of whether private hospitals should or should not be vicariously liable for the negligence of medical doctors practising there. The vicarious liability of private hospitals cannot be rejected wholesale on the basis that the respective roles of the hospitals and medical practitioners are distinct and rigidly delineated by statute; as we have canvassed, such an interpretation is unsupported by the relevant legislation. As discussed earlier, neither can the means

of compensation by the hospital or the practitioner be in itself determinative of vicarious liability.

[97] The test for vicarious liability in various claimants requires the court to determine the nature of the relationship between the hospital and the medical practitioner, and the connection between that relationship and the wrongful act by the practitioner. The determination is a question of fact, based on a consideration of multiple factors and calls for an evaluative judgment. The terms regulating the general relationship between a hospital and a practitioner, and the particular terms applicable in the circumstances of the alleged negligence, may vary from case to case. As such, the vicarious liability of the private hospitals for the torts of medical practitioners cannot be determined with a broad brush in a factual vacuum.

[98] We now apply the test to the present facts. Stage 1 requires us to ascertain whether there is a relationship of employment or akin to employment between the hospital and Dr Kok. The doctor's practising agreement signed between the hospital and Dr Kok provides, among others, that:

> We now apply the test to the present facts. Stage 1 requires us to ascertain whether there is a relationship of employment or akin to employment between the hospital and Dr Kok. The doctor's practicing agreement signed between the hospital and Dr Kok provides, among others, that:
>
> (i) Dr Kok is an independent contractor and not a servant of the hospital. In this regard we should add that the court is not precluded from looking beyond the labels ascribed by the parties to ascertain the true substance of the relationship;
>
> (ii) The hospital shall assist Dr Kok and provide the necessary backup services for Dr Kok's consultancy;
>
> (iii) Dr Kok is allowed to practice at the hospital on a non-exclusive basis;
>
> (iv) Dr Kok enjoys the right and freedom to operate his medical specialist service at the hospital without undue interference and interruption by the hospital, and shall be permitted to carry on his practice independently without obstruction or interference from the hospital;
>
> (v) Dr Kok shall endeavour to use hospital facilities in the treatment of his patients, subject to the best interest of the patient;
>
> (vi) Dr Kok is to be on call rotation at such time and for such period, and hold a number of clinical sessions as required by the hospital;
>
> (vii) The hospital does not pay any salary or allowance to Dr Kok; and
>
> (viii) Dr Kok may charge professional fees for consultation and procedures, whereas the hospital may levy operational, administrative or other fees.

[27] Reference is also made to the case of *Dr Hari Krishnan & Anor v Megat*

Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281; [2018] 3 CLJ 427 where Md Raus Sharif CJ again delivering the judgment of the Federal Court held as follows:

> [117] We first consider the relationship between the hospital and Dr Hari. Dr Hari and the hospital have signed a 'Consultant's Agreement for Use of Hospital Facilities and Services', the salient terms of which are as follows:
>
> (a) Dr Hari is deemed to be an independent contractor and not a servant or agent of the hospital;
>
> (b) Dr Hari shall comply with the hospital's directions and regulations, but such directions and regulations shall not impinge upon consultant's exercise of professional judgment in the care of his patients;
>
> (c) Dr Hari shall provide professional services for outpatients on a sessional basis in the hospital, during such periods as may be determined by the hospital;
>
> (d) Dr Hari may book operating sessions in the hospital for inpatients;
>
> (e) Dr Hari shall charge fees to his patients, which would be collected by the hospital and remitted to him monthly;
>
> (f) the hospital shall charge Dr Hari fees for facilities and services;
>
> (g) Dr Hari shall ensure that he is covered by insurance, and shall indemnify the hospital against liability resulting from his neglect or default.
>
> [118] It is recalled that the finding of negligence was against Dr Hari for his diagnosis, advise and treatment of the plaintiff: specifically, the negligent acts of advising the plaintiff to undergo the unnecessary second operation, failing to advise the plaintiff of the risk if bucking and blindness, and using the wrong procedure during the second operation. There was no finding of negligence relating to the provisions of drugs, facilities or medical records by the hospital. As such, the relevant factors in the present case concern Dr Hari's 'advise and conduct' of the second operation: this include whether such advice and conduct were subject to the hospitals control, done on behalf of the hospital, or a part of the hospital's business activity.
>
> [119] It is clear from the entire sequence of events that Dr Hari's diagnosis of the plaintiff's condition, advise to undergo the second operation and conduct of the second operation, were done in the course of Dr Hari's private practice. We find no evidence that the hospital exerted any control over Dr Hari's advice and conduct of the second operation, whether over 'what' Dr Hari did or 'how' he did it. 'The absence of even that vestigial degree of control would be liable to negative the imposition of vicarious liability' (per *Lord Reed in Cox v Ministry of Justice* [2016] AC 660).

[28] Guided by the above authorities, we now apply the test to the present facts. Thus, it is essential to ascertain whether there is a relationship of employment or akin to employment between the first defendant and second

defendant. To begin with, let us briefly look at the resident consultant agreement dated 4 September 2019 signed between the first defendant and second defendant which provides, among others:

> Clause 6: Payment by the Consultant
>
> To pay the Company the following:
>
> 6.7.1 Rental Charge
>
> The rental charge shall be paid on or before the 10th working day of each calendar month in advance for the duration of this Agreement or while the Consultant remain in occupation of the Suite at the amount as specified in Appendix 1.
>
> 6.7.2 Management fee
>
> The Consultant shall pay to the Company the Management Fee in the manner stipulated in Clause 4.8 hereof.
>
> 6.8 Consultant's Fees
>
> 6.8.1 To charge his patients according to the charges prescribed by the Hospital which fee shall be lesser than or equal to the fee schedule of the PFHSA 1998 or any other fee schedule as adopted by the Management from time to time.
>
> 6.8.3 To charge his inpatients and outpatient at the Hospital for any professional services through the Hospital only.
>
> 6.9 Account for All Monies Received
>
> To immediately account to the Hospital, for all monies with all laws, bylaws, rules, regulations and etiquette pertaining to the medical profession in the conduct of his practice.
>
> 6.12 Duty of Care & Skill
>
> 6.12.2 To be responsible for any claims, suits, action and litigation in respect of any negligence actions against him arising directly from his own negligence while performing his duties at the Hospital and/or the negligence of his employee (s), agents and the locum appointed by him during the term of the Agreement, if any.
>
> Clause 12: NO PARTNERSHIP
>
> That nothing herein contained shall be construed or have effect as constituting the relationship of partners or employer/employee between the parties and each parties shall at all time be responsible for the payment of his own medical insurance and other contributions and for payment of income tax as a self-employed person.

[29] Upon perusing the terms of the resident consultant agreement in its entirety, it is apparent that second defendant is a self-employed person who practices at the first defendant's hospital. If second defendant is the employee of

the first defendant as alleged by the plaintiff, we why wonder she was required under agreement to pay the rental charge and management fee for usage of the first defendant's facilities and equipment in the course of the second defendant's medical. Thus, on this is score alone is enough to strengthen the fact that there exists no employer-employee relationship between the defendants.

[30] Reading from the content and the words used in the agreement, is it crystal clear and unambiguous that the first defendant has no control over the advice by the second defendant as a consultant and gynaecologist at any time during the period of care, treatment and management of the first plaintiff and second plaintiff while at the first defendant's hospital.

[31] Further, at no time did the second defendant raised an objection to the first defendant's application to strike out the plaintiffs' claims against the first defendant. The second defendant had also in her statement of defence dated 31 January 2022 (encl 9) never challenged the nature of the relationship between the defendants to be one of an employer-employee relationship as clearly reflected in the resident consultant agreement signed by the second defendant herself.

[32] In *Lim Gim Seah v Lokman bin Talib & Ors* [2012] 4 MLJ 308, Anantham Kasinather JCA (as he then was) delivering judgment of the Court of Appeal held as follows:

> [14] ... In our judgment, the test is the same as is evident from this passage in the leading judgment of Lord Justice Widgery in the case of *Salsbury v Woodland and others* [1970] 1 QB 324 at pp 336–337:
>
> > It is trite law that an employer who employs an independent contractor is not vicariously responsible for the negligence of that contractor. He is not able to control the way in which the independent contractor does the work, and the vicarious obligation of a master for the negligence of his servant does not arise under the relationship of employer and independent contractor. I think that it is entirely accepted that those cases — and there are some — in which an employer has been held liable for injury done by the negligence of an independent contractor are in truth cases where the employer owes a direct duty to the person injured, a duty which he cannot delegate to the contractor on his behalf The whole question here is whether the occupier is to be judged by the general rule, which would result in no liability, or whether he comes within one of the somewhat special exceptions cases in which a direct duty to see that care is taken rests upon the employer throughout the operation. This is clear from authority; and for convenience I take from *Salmond on Torts* (14th Ed) (1965), p 687, this statement of principle:
> >
> > > One thing can, however, be said with confidence: the mere fact that the work entrusted to the contractor is of a character which may cause damage to

A

> others unless precautions are taken is not sufficient to impose liability on the employer.
>
> There are few operations entrusted to an agent which are not capable, if due precautions are not observed, of being sources of danger and mischief to others; and if the principal was responsible for this reason alone, the distinction between servants and independent contractors would be practically eliminated from the law.

B

[33] It is undeniable that the first defendant has directed its independent contractor through cl 6.8 of the agreement to obey the fee schedule of the Private Healthcare Facilities and Services Act 1998. However, it is grossly wrong to say that the 'control' in terms of charging her medical fees to be an element that is akin to employment. This is just a reminder by the first defendant for the second defendant to charge its patients fees according to the law.

C

D

[34] The other telling of evidence which has to be considered is the letter dated 5 February 2021 whereby the first defendant solicitors had communicated to the plaintiffs solicitors that the second defendant is not an employee of the first defendant but rather an independent contractor who practices at the first defendant's hospital. However, there has been no further communication by the plaintiffs vide their solicitors to attempt to obtain further clarifications from the first defendant on the nature of the relationship between the defendants. Surprisingly, the plaintiff filed and pleaded in its statement of claim that the second defendant is an employee of the first defendant and that the first defendant is vicariously liable for the negligent acts and/or omissions of the second defendant.

E

F

[35] It needs to be mentioned that there is gap for more than ten months from the day the letter dated 5 February 2021 was sent to the plaintiffs' solicitors to the day that the writ of summons and statement of claim was filed on 14 December 2021. We had sifted through the documentary evidence to see whether the plaintiffs had managed to come up with a satisfactory explanation for why they choose not to take up these contentious issues earlier. We found none. To us, the sudden filing of the statement of claim (without providing the details) was merely an afterthought. It only goes to shows that the plaintiffs has ulterior motive in filing the suit against the first defendant. It was solely done to protect their own interest and not done in a bona fide manner. As a result, the plaintiffs is not entitled to seek the aid of this honourable court as they have not come before this honourable court with a clean hand.

G

H

I

[36] Finally, apart from the above causes of action, plaintiff plead in the alternative that the first defendant owes a non-delegable duty towards the second plaintiff. The plaintiffs argued that the alleged 'new issues' pleaded by

the plaintiff in para 7.4 of the reply to the first defendant defence at p 169 of the record of appeal, Vol 5 is purely on the basis of a further elaboration or explanation by the plaintiffs to provide clarity and full understanding of the issues in dispute in the plaintiffs' suit. It also acts as an important standpoint which places the plaintiffs' suit in its actual perspective to be evaluated by this honourable court.

[37] With greatest respect, we beg to differ. The non-delegable duty of care relied on by the plaintiffs against the first defendant spring a surprise to us because the plaintiffs did not plead this material facts in their statement of claim with particulars. It was only alluded to in the reply to the defence. This is truly unacceptable and merely an afterthought.

CONCLUSION

[38] For the above reasons, we unanimously find that there is no sustainable cause of action against the first defendant. The learned High Court judge had patently fell into error in his findings that warrant appellate intervention.

[39] We accordingly allow the appeal and strike out the claim against the first defendant with costs of RM10,000 here and below. The decision of the learned judge is set aside.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh